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Supreme Court, U.S.

FILED

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JOSEPH E. SPANIOLO, JR.  
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No. \_\_\_\_\_

**In The  
Supreme Court Of The United States**

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OCTOBER TERM, 1988  
\_\_\_\_\_

**JOSEPH M. FLYNN,**  
*Petitioner,*

v.

**STATE OF CONNECTICUT,**  
*Respondent.*

\_\_\_\_\_  
**BRIEF IN OPPOSITION TO THE  
PETITION FOR A WRIT OF CERTIORARI TO THE  
APPELLATE COURT FOR THE  
STATE OF CONNECTICUT**  
\_\_\_\_\_

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QUESTION PRESENTED

- I. WHETHER THE GUILTY VERDICTS WERE LOGICALLY INCONSISTENT WHERE, ALTHOUGH THE CRIMES REQUIRED DIFFERENT MENTAL STATES, THESE MENTAL STATES RELATED TO DIFFERENT RESULTS OR CIRCUMSTANCES?



## TABLE OF CONTENTS

TABLE OF AUTHORITIES. . . . .	i
RULES INVOLVED . . . . .	ii
OPINION BELOW . . . . .	1
JURISDICTION. . . . .	1
STATEMENT OF THE CASE . . . . .	1
REASONS FOR DENIAL OF THE JURY . .	6
CONCLUSION . . . . .	10



## TABLE OF AUTHORITIES

CASES	PAGE
<u>United States v. Powell</u> , 469 U.S. 57 (1984) . . . . .	6
<u>Wolfe v. North Carolina</u> , 364 U.S. 177, 196 (1960) . . . . .	8
STATUTES	
General Statutes § 53a-64 . . . . .	4
General Statutes § 53a-3(11) and (13) . . . . .	8
General Statutes § 53a-167c(a) . . . . .	4
MISCELLANEOUS	
28 U.S.C. 1257 (3) . . . . .	1

## STATUTES

### Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a



lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court.



### OPINION BELOW

The opinion of the Appellate Court of Connecticut (Pet. App. 1A-30A) is reported at 14 Conn. App. 10, 539 A.2d 1005 (1988).

### JURISDICTION

The judgment of the Appellate Court of Connecticut was entered on April 5, 1988 and the petitioner's motion for reargument or reconsideration was denied by the Appellate Court on May 5, 1988. A petition for certification for review to the Supreme Court of Connecticut was denied on June 15, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

### STATEMENT OF THE CASE

Following a jury trial, the petitioner, Joseph M. Flynn was convicted of

assault on a peace officer, reckless endangerment in the second degree, breach of the peace and interfering with an officer. He received a total effective sentence of five years incarceration.

The charges against petitioner arose from an incident in a bar in the early morning hours of November 17, 1984. Four uniformed police officers entered the bar, looking for a suspect in an assault investigation. The bar was crowded, dark and noisy. While two officers were standing near the dance floor, with their backs to the bar area, each was struck by a beer bottle. A third officer, standing nearby, saw the petitioner throw a full or partially full beer bottle at the two officers, although he did not see it strike them.

When an attempt was made to arrest the petitioner he began kicking and struggling; it required the efforts of all four officers to handcuff and remove the petitioner from the bar. (Pet. App. 3A-4A).

On appeal to the Appellate Court of Connecticut the petitioner raised several claims, including a claim that several combinations of the four offenses for which he was charged and convicted were legally inconsistent because they required different mental states, i.e. intent and recklessness.<sup>1</sup> He could not, he claimed, simultaneously act both intentionally and recklessly with regard to the same factual circumstances.

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<sup>1</sup> Statutes are set forth in petitioner's brief at 4-5.

The Appellate Court found that the crimes charged were not inconsistent as a matter of law. Addressing one of the specific inconsistencies alleged by petitioner, the Appellate Court stated:

The crime of assault on a peace officer, which requires intentional conduct, and the crime of reckless endangerment, which requires reckless conduct, are not legally inconsistent offenses. General Statutes § 53a-167c(a) provides in relevant part that "[a] person is guilty of assault of a peace officer . . . when [he acts] with intent to prevent a reasonably identifiable peace officer . . . from performing his duty . . . ." (Emphasis added.) General Statutes § 53a-64 provides that a person is guilty of reckless endangerment if he "recklessly engages in conduct which creates a risk of physical injury to another person." (Emphasis added.) Applying these statutory definitions to the facts of this case, we find that the jury could reasonably have found that when the defendant threw the beer bottle at the officers he did so with the requisite intent--preventing the officers from performing their duties--to

find him guilty of assault on a peace officer. At the same time, the jury could reasonably have found that the defendant acted recklessly with respect to the other patrons in the bar and properly have found him guilty of reckless endangerment. It is not inconsistent, therefore, to find that a criminal defendant possesses two different mental states, as long as these different mental states relate to different results. Pet. App. at 18A)

Finding this analysis equally applicable to all of the inconsistencies alleged by the petitioner, the Appellate Court held his claim to be without merit.

One of the petitioner's four convictions, interfering with an officer, was set aside on double jeopardy grounds which are not contested in this petition. The remaining three convictions were unanimously affirmed by the Appellate Court which subsequently

denied, without further opinion, petitioner's motion to reargue. The Supreme Court of Connecticut also declined, without opinion, to review this matter.

### ARGUMENT

The crux of petitioner's argument that this is an appropriate case for the granting of a writ of certiorari is his contention that it will give this Court an opportunity to decide a question left open by United States v. Powell, 469 U.S. 57 (1984) -- the "proper resolution" of a situation in which a defendant is convicted of two crimes but one guilty verdict logically excludes the other. 469 U.S. at 69, n.8.

Although this does appear to be an open question, it is inapplicable to the present case. The Appellate Court



reviewed the petitioner's allegations and concluded that the offenses under consideration were not inherently inconsistent.<sup>2</sup> Conviction of one does not logically exclude conviction of the other.

To reach this conclusion, it was necessary for the Appellate Court to examine the particular Connecticut statutes at issue in light of the specific factual circumstances of this case. As a result, consideration of the petitioner's claim would add nothing of precedential value to the jurisprudence of inconsistent verdicts and would

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<sup>2</sup> For the purpose of this petition, there are three pair of alleged inconsistencies: 1) assault on a peace officer and reckless endangerment 2) assault on a peace officer and breach of peace arising from reckless conduct 3) reckless endangerment in the second degree and breach of the peace arising from intentional conduct.

result in the expending of this Court's resources to resolve a question wholly dependent on a unique factual context. See Wolfe v. North Carolina, 364 U.S. 177, 196 (1960).

As Connecticut's statutory language make clear, the mental states of recklessness and intentionality do not exist in a vacuum, but only with reference to particular results and circumstances. Connecticut General Statutes § 53a-3(11) and (13) (Pet. at 3). The Appellate Court looked to the statutory definitions of each of the crimes charged, and applied the definitions to the specific facts of this case. The court concluded that the crimes were not logically inconsistent because, inter alia the jury may have found that the petitioner threw the

bottle with intent to prevent the officers from performing their duties but also acted recklessly in creating a risk of injury to patrons in the bar.

The issue of whether the Connecticut statutes in question constituted inherently inconsistent offenses is largely one of state law, subject only to the general fourteenth amendment guarantees of due process. Although the defendant is correct in stating that the record is not clear regarding what specific acts the jury found to give rise to what specific charges, it is clear that the mere fact that the crimes charged required different mental states does not render them inherently inconsistent when it is possible that the mental states relate to different circumstances.

This fact specific determination  
does not warrant further review by this  
Court.

CONCLUSION

The petition for a writ of cer-  
tiorari should be denied.

Respectfully submitted.

STATE OF CONNECTICUT

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